

Conversely, respondent and its insurance fund contend the April 11, 2005, Order should be affirmed. They argue the Judge correctly held that claimant failed to provide

respondent with timely written claim although that issue was not raised to the Judge. They also argue claimant failed to provide timely notice of the alleged accident and injury.

The issues before the Board on this appeal are:

1. Did claimant provide respondent with timely notice of the alleged February 16, 2004, accident and injury?
2. If so, did the Judge err by denying claimant's request for benefits for failing to provide respondent with timely written claim when that issue was not raised by the parties?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

Before an injured worker is entitled to receive workers compensation benefits, the worker's employer must have either actual knowledge or notice of the work-related accident or injury, as required by K.S.A. 44-520, which provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

And the Board has interpreted that statute to require sufficient information be given to the employer that a reasonable person would have reason to believe or be placed upon

notice that the work activities have caused or were causing an injury.¹ And that information should be considered in light of the employer's knowledge of all the facts and circumstances, including claimant's work activities and the propensity of those activities to cause injury.

Claimant testified that on approximately February 16, 2004, he strained his right arm when he fell from a truck trailer filled with sand and hung from a tarp on the side of the trailer. About two or three feet from the ground, claimant let go of the tarp and dropped to the ground, landing on his feet. According to claimant, he advised Scott Hoskinson, who is the president of the company and claimant's supervisor, about the incident.

Well, I got down and finished tarping the truck and went ahead and took the load and when I got back I was told again about the tarp hanging up and it needed to be fixed and I about fell off and broke my neck and it was time to do something about it.²

Claimant testified he thought he had strained his right arm and shoulder. And about four or five days later, his low back began to hurt more than it normally did. At that time, claimant advised Mr. Hoskinson that his back was symptomatic and it needed medical treatment.

On February 18, 2004, claimant consulted Dr. Michael P. Estivo. But claimant did not tell Dr. Estivo about the tarp incident. Instead, claimant advised the doctor he had been having back pain for several years that had worsened in the past few months.

Mr. Hoskinson testified claimant never told him he had injured his back at work. Both Mr. Hoskinson and Sheila Hoskinson testified they were not aware claimant was alleging he had suffered an injury at work until February 2005, when they received a letter from claimant's attorney.

Considering the entire record, the Board finds claimant failed to prove he provided respondent with sufficient information any time before February 2005 to place respondent on notice that he had sustained an injury at work. Because claimant has failed to establish he has complied with the requisite time requirements for notice as set forth in K.S.A. 44-520, claimant's request for workers compensation benefits should be denied.

¹ *Hawbaker v. James R. Turnbull Painting*, No. 184,632, 1998 WL 229863 (Kan. WCAB Apr. 24, 1998), *appeal dismissed*, Kansas Court of Appeals unpublished opinion, No. 81,306 (Aug. 6, 1999).

² P.H. Trans. at 10.

Based upon the above, the Board need not address the issue whether the Judge erred by concluding claimant failed to provide respondent with timely written claim when that issue was neither raised nor addressed by the parties.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.³

WHEREFORE, the Board affirms the Judge's conclusion that claimant's request for compensation should be denied.

IT IS SO ORDERED.

Dated this ____ day of July, 2005.

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Fund
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 44-534a(a)(2).